

**IN THE INCOME TAX APPELLATE TRIBUNAL  
Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member  
AND  
Shri B. Ramakotaiah, Accountant Member**

**ITA No.426/Hyd/2016**  
(Assessment Year: 2011-12)

Dy. Commissioner of Income Tax, Circle 16(2) Hyderabad  
(Appellant) Vs M/s. Progressive Digital Media Private Limited Hyderabad  
PAN: AAFCP2745P  
(Respondent)

C.O. No.30/Hyd/2016  
**(Arising out of ITA No.426/Hyd/2016**  
(Assessment Year: 2011-12)

M/s. Progressive Digital Media Private Limited, Hyderabad  
PAN: AAFCP2745P  
(Appellant) Vs Dy. Commissioner of Income Tax, Circle 16(2) Hyderabad  
(Respondent)

For Revenue : Shri K. Srinivas Reddy, DR  
For Assessee : Shri S.P. Chidambaram

Date of Hearing: 03.04.2018  
Date of Pronouncement: 11.04.2018

**ORDER**

**Per Smt. P. Madhavi Devi, J.M.**

Both are cross appeals filed by both the assessee as well as the Revenue against the final assessment order dated 21.08.2016 passed u/s 143(3) r.w.s. 92CA(3) r.w.s. 144C(5) of the I.T. Act, 1961.

2. Brief facts of the case are that the assessee company, engaged in providing Data creation, content development and back office data processing services, filed its return of income for the A.Y 2011-12 on 28.11.2011 admitting total income of Rs.2,77,32,647. During the assessment proceedings, the AO observed that the assessee has entered into international transactions of providing technical support services to its AEs. Therefore, a reference was made to the TPO for determination of the ALP of the said international transaction. The TPO, after going into the profile of the assessee, observed that the assessee is engaged in providing back office data creation, content development and support services in relation to analysis, content search and projection for all types of businesses. Thus, he observed that the assessee is providing ITES services to its group companies and that the assessee has adopted TNMM as the most appropriate method and has arrived at its margin at 15.09% as against the margin of the comparables at 14.38% and stated that the international transaction is at Arms' Length. The TPO was however, held that the method of search process adopted by the assessee suffers from defects resulting in selection of inappropriate comparables and rejection of companies that are appropriate comparables. He therefore, rejected the TP document of the assessee and made an independent analysis under TNMM and arrived at the Arms' Length margin of the comparable at 23.91% and proposed an adjustment of Rs.1,37,90,982 u/s 92C(3) of the I.T. Act. The TPO adopted 13 companies as final comparables. In accordance with the TPO's order, the draft assessment order was proposed by the AO against which the assessee preferred its objection before the DRP. The DRP directed

exclusion of 8 companies from the final list of comparables, against which, the Revenue is in appeal before us. While excluding the 8 comparable companies, the DRP has *suo moto* excluded Microgenetic Systems Ltd and also excluded certain other companies which according to the assessee, are comparable but only a correction with regard to their margins is to be made. Therefore, the assessee is in cross objection seeking inclusion of these companies and also exclusion of certain companies which according to the assessee, are not comparable but have been held to be comparable by the DRP. For the sake of clarity and ready reference, the grounds of appeal raised by the Revenue are reproduced hereunder:

*“1. The direction of learned DRP-1 Bengaluru is erroneous on facts and circumstances, in law.*

*2. The learned DRP-1 Bengaluru, erred in directing the TPO/AO to exclude 8 comparable companies out of 13 comparable companies adopted for Transfer Pricing Adjustment which resulted in reduction in full of Rs.1,37,90,982 proposed for adjustment in Arm’s Length Price of the international transaction”.*

3. The grounds of cross objections raised by the assessee are as under:

*“1. That on the facts and circumstances of the case, the learned Assessing Officer [“AO”]I Dispute Resolution Panel [“DRP”] has erred in rejecting the Transfer Pricing Documentation maintained by the Respondent and making an adjustment on the international transactions pertaining to provision of IT enabled Services [“ITeS”].*

*Selection of uncomparable companies*

*2. That on the facts and circumstances of the case and in law, the AO/DRP erred in accepting following as comparable companies as selected by the TPO:*

*(i) Accentia Technologies Ltd; and*

*(ii) Crossdomain Solutions Pvt. Ltd.*

*Exclusion of comparable companies not objected by the Respondent*

*3. That on the facts and circumstances of the case, the learned AO/DRP has erred in excluding Microgenetic Systems Ltd as a comparable, which is not objected by the Respondent before DRP.*

*4. That on the facts and circumstances of the case, the learned AO/DRP has erred in rejecting the following companies outright, when only margin rectification was sought by the Respondent before DRP, viz,*

*(i) e4e Healthcare Business Services Pvt. Ltd.; and*

*(ii) Mastiff Tech Pvt. Ltd.*

*5. That on the facts and circumstances of the case, the learned AO/DRP has erred in excluding the above companies without providing any show cause notice or a reasonable opportunity of being heard to the Respondent, completely disregarding the provisions of the Act and in utter disregard to the principles of natural justice.*

*6. That on the facts and circumstances of the case, the learned AO/DRP has erred in excluding the companies not objected, when the Transfer Pricing Officer ["TPO"] had already examined and decided the issues based on the facts and material available on record.*

*7. That on the facts and the circumstances of the case and in law, the AO/DRP erred in confirming the TPO's stand of treating the provision for bad and doubtful debts and bad debts written off as non-operating expenses for the purpose of margin computation of comparable companies as selected by TPO.*

*Inclusion of comparable companies requested by the Appellant*

*8. That on the facts and circumstances of the case and in law, the AO/DRP erred in confirming the rejection of following comparable companies, as rejected by the TPO:*

*(i) R Systems International Ltd; and*

*(ii) Microland Ltd.*

Use of Filters

8. That on facts and circumstances of the case and in law, the AO/DRP erred in upholding the use of different financial year end filter for rejection of comparable companies while undertaking the comparative analysis.

Rejection of use of multiyear data

10. That on facts and circumstances of the case and in law, the AO/DRP erred in rejecting the use of multiyear data and using data for the FY 2010-11 only.

Adjustment for risk differences

11. That on the facts and circumstances of the case and in law, the AO/DRP erred in disregarding the risk profile of the Appellant vis-a-vis alleged comparable companies selected by the TPO and not allowing risk adjustment as per the provisions of Rule 108(1 )(e) of the Rules.

Arm's length range of 5%

12. That the AO / TPO be directed to re-work the profit margins of the Appellant vis-a-vis the resultant comparable companies and to allow the benefit of + /- 5% range as provided in proviso to Section 92C(2) of the Act.

13. The Respondent craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal”.

4. The learned DR submitted that as seen from the service agreement entered by the assessee with its AE, the assessee is also providing high end services to its AEs and therefore, the DRP ought not to have held the assessee to be only a back office service provider to exclude the companies which are otherwise comparable to the assessee.

5. The learned Counsel for the assessee, on the other hand, reiterated the submissions made by the assessee before the

authorities below and drew our attention to the document filed in support of the findings of the DRP for exclusion of the companies objected to by the assessee and also for inclusion of some of the comparable companies.

6. Having heard the parties at length and having gone through the material on record, we find that the following are the final comparables taken by the TPO:

- i) Accentia Technologies Ltd
- ii) Acropetal Technologies Ltd (Seg.)
- iii) Cosmic Global Ltd
- iv) Crossdomain Solutions P Ltd
- v) e4e Healthcare
- vi) eClerx Services Ltd
- vii) Informed Technologies Ltd
- viii) Infosys BPO
- ix) Jeevan Scientific Technologies Ltd
- x) Jindal Intellicome Ltd
- xi) Mastiff Tech P Ltd
- xii) Microgenetic Systems Ltd
- xiii) TCS E-serve Ltd

7. From these companies, we find that both the TPO and the assessee has accepted the following companies as comparable to the assessee:

- i) Cosmic Global Ltd
- ii) Informed Technologies Ltd
- iii) Jeevan Scientific Technologies Ltd

8. As regards the following companies, both the assessee as well as the Revenue agree that they are comparable to the assessee:

- i) e4e Health Care
- ii) Mastiff Tech P Ltd
- iii) Microgenetic Systems Ltd

9. The assessee's only objection was that the correct margin of the two companies i.e. e4e Healthcare and Mastiff Tech Ltd is to be adopted for comparative analysis.

10. Since both the assessee as well as the Revenue agree that these companies are comparable to the assessee, but only an adjustment to the margins to be made, we direct the TPO to consider the same as comparable after making necessary adjustments to the margins of the respective companies.

11. As far as Microgenetic Systems Ltd is concerned, it is the case of both the parties that it is comparable to the assessee, we therefore, direct the TPO to include the same in the final list of comparables.

12. As regards the comparables excluded by the DRP against which Revenue is in appeal before us, we find that they are as follows:

- (i) Acropetal Technologies Ltd (Seg);
- (ii) eClerx Services Ltd;
- (iii) Infosys BPO;
- (iv) Jeevan Scientific Technologies Ltd; and
- (v) TCS E-Serve Ltd.

The DRP has excluded all these companies on the ground that they are functionally dissimilar.

13. The learned DR has reiterated that the assessee is also performing similar high end services and therefore, the DRP is not right in directing exclusion of these companies.

14. The learned Counsel for the assessee has submitted that both the TPO as well as the DRP have accepted the assessee to be a back office support service provider and there is no challenge to the said findings by the Revenue and therefore, such findings have become final and the DR cannot advance a new ground before the Tribunal.

15. We accept this contention of the assessee, because, it is the TPO who has considered the assessee to be a back office support service provider and the DR cannot now re-characterize the profile of the assessee. Once it is accepted that the assessee is only a back office support service provider (ITES), then such companies which are also engaged in similar services only can be considered as comparable to the assessee.

16. The learned Counsel for the assessee has relied upon the decision of the Coordinate Bench of the Tribunal in the case of S&P Capital IQ (India) Private Limited vs. DCIT in ITA Nos. 200 and 435/Hyd/2016 for the A.Y 2011-12, wherein S&P Capital IQ was also providing I.T enabled services like the assessee before us and the TPO therein also had taken the very same 13 companies as comparable to the assessee therein. He has also drawn our attention to the relevant paragraphs of the order of the Tribunal, wherein, these companies have been considered at length and the Tribunal has held that they are not comparable to the assessee therein. Therefore, according to him, on the basis of the said decision, exclusion of these companies is to be upheld. We have gone through the order of the Tribunal, to which the learned A.M.

is a signatory. The Tribunal at Paras 12,16, 18 and 23 had held as under:

*“ii. Acropetal Technologies Ltd (Seg):*

*12. This company is included by TPO but excluded by DRP for the following reasons:*

*"Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bangalore in IT(TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above :- 18 -: S&P Capital IQ (India) Pvt Ltd., company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no.15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO function performed by the assessee. The performance of the engineering design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing- (KPO) would do and not a business processing outsourcing (BPO).' Similar View was taken by Hon'ble Bangalore ITAT in the case of - Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables".*

*12.1. We do not see any reason to differ from the findings of DRP as it is providing high end KPO services and is functionally different. The order of exclusion is therefore, upheld.*

*vi. eClerx Services Ltd.,:*

*16. This company is included by TPO but excluded by DRP for the following reasons:*

*"Having considered the submission, respectfully following the decision of Hon'ble the ITAT for the AY 2009-10 in assessee's own case, as the functional profile of the assessee company and the above company remain the same, we direct the AO to exclude the above company from comparables".*

*16.1. We do not see any reason to differ from the findings of DRP as it is providing high end KPO services and is functionally different. The order of exclusion is therefore, upheld.*

*viii. Infosys BPO*

*18. TPO included the same in the list of comparables on the reason that the turnover does not have any effect on profitability. DRP excluded the same being functionally different. Even though, Ld. DR has argued vehemently for inclusion, we do not see any reason to include as Infosys BPO is functionally different and being excluded in many cases in earlier years as well being unique in its functionality.*

*xiii. TCS E-serve Ltd:*

*23. TPO included the same in the list of comparables on the reason that the turnover does not have any effect on profitability. DRP excluded the same by stating as under:*

*"Having considered the submissions, on perusal of annual report, it is noticed by us from the schedule to the financial statement that the company is engaged in the business of providing information technology - enabled services/business processing outsourcing service, primary to the Citi group companies introduced globally the transaction processing include the broad spectrum of :- 24 -: S&P Capital IQ (India) Pvt Ltd., activities involving the processing, collections, customer care and payments in relation to the services offered by Citi group to its corporate and retail clients. As per the annual report, the company also provide technical services involving software testing, verification and validation of software at the time of implementation and data centre management activities, which makes the company functionally incomparable with the assessee, accordingly, we direct the assessing officer to exclude the above company from comparables".*

*Even though, Ld. DR has argued vehemently for inclusion, we do not see any reason to include as this company is functionally*

*different and being excluded in many cases in earlier years as well being unique in the functionality”.*

17. Since the facts and circumstances in the case before us are similar and the learned DR has not brought out any distinguishable factor, respectfully following the decision above, we do not see any reason to interfere with the order of the DRP/AO on these comparables.

18. As regards Jeevan Scientific Technologies Ltd is concerned, the learned Counsel for the assessee submitted that it is functionally different and also fails the ITES revenue being more than 75% filter.

19. The learned DR, however, submitted that the TPO has taken only the segmental details of the said company and therefore, there was no need to exclude the said company from the final list of comparables.

20. Having regard to the rival contentions and the material on record, we deem it fit and proper to remit this issue to the file of the AO/TPO for reconsideration and only if the segmental results are taken, the same can be taken as comparable.

21. As the learned Counsel for the assessee did not advance any arguments with regard to any other grounds of appeal other than the exclusion and inclusion of the comparables as discussed above, the other grounds are not adjudicated and are rejected as not pressed.

22. In the result, Revenue's appeal as well as the Cross Objection filed by the assessee are partly allowed.

Order pronounced in the Open Court on 11<sup>th</sup> April, 2018.

**Sd/-**  
**(B. Ramakotaiah)**  
**Accountant Member**

**Sd/-**  
**(P. Madhavi Devi)**  
**Judicial Member**

Hyderabad, dated 11<sup>th</sup> April 2018.

***Vinodan/sps***

Copy to:

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- 2 Progressive Digital Media Pvt. Ltd, 2<sup>nd</sup> Floor, Wing BNSL Centrum, Plot No.S-1 Phase 1 & 2, opp: BSNL Office, KPHB Colony, Kukatapally, Hyderabad 500072
- 3 CIT (A)-DRP-1, G-16 Ground Floor, Central Revenue Buildings, Queens Road, Bengaluru 560001
- 4 Pr. CIT – 4, Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

*By Order*